employment after his arrival at Chagres, was on a voyage across the Atlantic, still we think while a passenger on board the Henlopen and the Zachary Taylor, he was not a seaman at sea. The meaning of these words is a seaman employed as such at sea. If he had been one of the seaman on board the Zachary Taylor, he would be considered as at sea, as soon as she sailed from the wharf at Philadelphia, and this whether at the time of making his will he was on board the Henlopen or the Zachary Taylor, the two vessels being fastened together and the Henlopen towing the Zachary Taylor.

The difficulty is not in the place where the will was made, but in the fact that the testator was not at the time of making it a seaman in the sense of the statute, any more than he was in his passage in the cars from Providence to Stonington and thence in the steamboat to New York and thence in the cars to Philadelphia.

Decree of the Municipal Court reversed.

Supreme Court, New York. Monroe General Term.[1]

DANIEL W. BUELL *vs.* AARON BISSELL, ADMINISTRATOR, ETC., OF ALEXANDER BISSELL, DECEASED.

1. The payee of a promissory note, who transfers it for a valuable consideration, though after its maturity, impliedly warrants that it is not void for usury.
2. The ground of implied warranty, either of title or quality, at common law, is the presumed superior knowledge of the vendor; per SELDEN, J.
3. A., the payee of an overdue note, transferred it for a valuable consideration to D., who sued on it; but the defence of usury being interposed by the maker, the latter had judgment, with costs. D. then brought an action against the administrator of A. for the amount paid on the sale of the note; *held*, that he was entitled to recover.
4. *Held*, also, that he might have not only the defendant's, but his own costs in the prior action; *quære*, whether he was not entitled also to counsel fees therein.

The plaintiff sold to Alexander Bissell, the defendant's intestate, a lot of land, and received, in part payment therefor, a promissory

[1] WELLES, JOHNSON, and SELDEN, Justices.

note, executed by one Richardson to the said intestate, for the sum of two hundred and thirty-six dollars and ninety cents. The note fell due before its transfer to the plaintiff. Nothing was said at the time of the transfer on the subject of a defence to the note.

In an action by the plaintiff, against Richardson the maker, to recover the amount of the note, the latter set up the defence of usury. Upon the trial the defence was established, and the defendant, Richardson, obtained a judgment against the plaintiff for the costs of the suit, which the plaintiff paid.

This action was brought to recover the amount of the note, and the costs of prosecuting the suit upon it, together with the costs so recovered by and paid to Richardson. The referee, before whom the cause was tried, reported in favor of the plaintiff for the full amount claimed; and the defendant now moves to set aside this report, and for a new trial.

SELDEN, J.—The main question presented in this case is, whether the payee of a note, who transfers it for a valuable consideration, impliedly undertakes that the note is not void for usury.

I am not aware that this question has been settled by any direct adjudication. It is to be governed, therefore, by the principles which have been judicially applied to analogous cases.

The doctrine that in every sale of a chattel there is an implied warranty on the part of a vendor, that he is the owner of the property and has a right to convey, is derived both from the common and the civil law, and has never been disputed. It is founded in the obvious justice of the case. The vendor is presumed to be cognizant of his own title. The vendee, not having the same means of knowledge, must necessarily trust to the representations of the vendor.

The rule in question therefore requires no more from the vendor than a guarantee that he is not committing a fraud. But, in respect to the obligations of the seller as to the *quality* of the article sold, there is a great diversity, not only between the civil and the common law, but among the different tribunals, whose decisions are professedly based upon the latter. Thus the civil law held, that every contract of sale included a warranty, not only against those

material defects, which would either destroy, or materially impair, the utility of the article sold for the purpose for which it was bought, but against every other defect, except such as were either of that obvious kind, that would not be likely to escape the attention of a careful buyer, or could be shown, by direct proof, to have been within his knowledge.

On the other hand, the common law applies the maxim, *caveat emptor*, to most cases of sale. By the general principles of that law, unless a purchaser exacts an express warranty as to the qualities of the subject of the sale, no obligation attaches to the seller in that respect, except in cases of fraud.

The common law courts, however, have been by no means uniform in their adherence to, or exposition of, this doctrine. I shall not attempt a review of the numerous conflicting cases on the subject. It would be an onerous as well as unprofitable task. But I will give a few thoughts, which have been suggested by a cursory examination of some of the authorities.

It is obvious that Courts, as well as elementary writers, in the rules which they have laid down in this question, have aimed to follow certain plain principles of natural justice; and also that, in the main, they concur in regard to those principles. The differences among them, seem to have arisen from their not adopting an analysis sufficiently close to develope and limit, with precision, the rules they were seeking to expound or apply.

The question which lies at the threshold of this subject, and without the definitive settlement of which, we can come to no satisfactory conclusion, is this:—

What is the basis of every implied warranty on the part of a vendor of goods, whether it be of the title to, or the qualities of, the article sold?

Some able writers upon the civil law assume, that it is a necessary and inherent part of every contract of sale, that the seller will cause the buyer to *have* the thing sold; and hence the obligation of warranty on the part of the seller as to the *title;* and, from this obligation, they deduce, as its logical consequence, an implied warranty in all cases as to the *qualities* of the article sold; because, as

they say, "to be obliged to cause the buyer to have the thing in the intention of the parties, is to cause him to have it *usefully*."—Pothier on Cont. of Sale, Section 203.

This exposition, however, of the foundation upon which the doctrine of implied warranty rests, is liable to serious objections.

If such a warranty is an inherent part of every contract of sale, or, which is the same thing, of every transfer of the title to property, unless otherwise agreed, why does it not apply to judicial sales, to sales by guardians of infants, by trustees of married women, and many other cases, to which no one ever thought of applying the doctrine.

It is true, we can see very good reasons why the Courts should not, in these cases, superadd, by implication, an obligation to the contract, which it would not otherwise contain; but the doctrine we are contesting is, that the *contract itself* embraces it; that it is *inherent* in the very nature of the contract.

Again, upon this supposition, why should the obviousness of the defect, or a knowledge of it by the purchaser, prevent the warranty in regard to the quality of the article from attaching. These circumstances are no answer to an express warranty, by either the civil or the common law; and if the doctrine of Pothier is true, that every contract of sale, *ex vi termini*, contains a warranty of the quality as well as the title, why should they have any greater effect in the one case than in the other; and yet there is no implied warranty, even by the civil law, against such defects.

It is clear, I think, that some other ground must be sought for this doctrine of implied warranty than that we have been considering.

The common law, as it seems to me, imposes the obligation upon a vendor to make good the title, because it is fair and just to presume that *he knew* the nature and extent of his own right; and the law, therefore, will not put the purchaser to the necessity of establishing this knowledge by proof, so as to charge the vendor with a fraud; but, assuming superior knowledge as to the title on the part of the vendor, it holds his liability to be absolute, and will not permit this legal presumption to be rebutted by proof.

It is a universal principle of justice, recognised alike by the civil and the common law, that whenever a thing sold has some latent defect, known to the seller but not to the purchaser, the former is liable for this defect, unless he discloses his knowledge on the subject to the latter before, or at the time of, the sale.

The doctrine of implied warranty of *title* rests upon the same principle. Its basis is the presumed knowledge, by the vendor, of the circumstances affecting his own title; and hence, in the case of judicial and other sales, where that presumption could not properly be held to arise, no warranty is implied.

This warranty is not, therefore, a part of the contract itself, as made between the parties, but is an obligation which the law annexes thereto, in accordance with the demands of justice, when, and only when, the circumstances are such as to require it. Now, it is plain that this principle is just as applicable in respect to the quality, as to the title, of the thing sold; that is, in a case where the circumstances authorize a presumption of superior knowledge, by the vendor, as to the quality, his responsibility should be the same as in respect to the title. There is no reason for raising an implied contract in the one case, which does not equally exist in the other.

For instance, one who sells an article of his own manufacture may with propriety, nay should, be presumed to be cognizant of any latent defect, arising from the peculiar process by which the article is produced.

The English Courts, therefore, in holding that such cases are exceptions to the doctrine of *caveat emptor*, have introduced no new rule; but simply applied that plain principle of justice, which, in respect to the *title*, has commanded universal assent.

Again, those cases, both in the English and American Courts, which hold that sales by sample are also exceptions to the general rule, rest upon the same principle.

The contract, in such cases, is not necessarily broader in its terms than in others, but because the vendor alone has generally the means of *knowing* whether the article sold corresponds to the sample, and would, therefore, practise a fraud if it did not correspond, the law holds him responsible.

The same is true of goods sold, and sent, pursuant to order, from a distance. Indeed, all cases, when the articles sold are not present, and are not seen by the purchaser prior to the sale, are exceptions to the general rule.

The nature of these exceptions, and the obvious reasons upon which they must rest, point strongly to the principles for which I am contending; to wit, that the basis of every implied warranty upon a sale is, the presumed superior knowledge of the vendor in regard to the particular defect, whether it be a defect of title or in quality.

I am aware that several of the cases, in the English Courts establishing these exceptions, have been somewhat severely commented on in this State, in the case of *Hart* vs. *Wright*, (17 Wendell, 267, S. C.; 18 Wend. 449,) and also in *Waring* vs. *Mason*, (18 Wend. 426.)

Among the cases thus censured are those of *Gardiner* vs. *Gray*, 4 Camp. 144; *Laing* vs. *Fidgeon*, 6 Taunt. 108; and *Jones* vs. *Bright*, 5 Bingh. 533.

If, however, we look simply at what was really decided in those cases, instead of the loose remarks of some of the judges, I think we shall find no occasion for the strictures passed upon them.

The two first were both cases of sales by samples, where the purchaser neither saw, nor had an opportunity of seeing, the articles until after the sales; and, when on trial, they were proved not to correspond with the sample. These decisions certainly accord with several cases in our own Courts, and rest, as it seems to me, upon the most solid basis of reason and justice.

Lord Ellenborough puts the case of *Gardiner* vs. *Gray* upon the true ground. He says, "When there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply;" page 145.

The case of *Jones* vs. *Bright*, was a case of the sale of a manufactured article by the *manufacturer himself*, in which there was an intrinsic and latent defect, growing out of the process of manufacture.

The Court very properly, as I think, held, that the vendor was

liable. It is true there are dicta by some of the judges in this case, that cannot be sustained; but the decision could not with propriety have been different.

It is a little singular that this and some other English cases, have been sometimes understood, as seeking to establish the doctrine, that there was a difference between *manufactured* and other articles of trade, in respect to the responsibilities of the vendor.

The case was not put upon any such ground, but, on the ground that the defendant, being *himself* the manufacturer, might justly be presumed to have better means of knowing those qualities which resulted from the mode of manufacture, than the purchaser.

That this was the true reason of the decision is apparent. Mr. Justice Park, says, "But on the case itself I have no doubt, distinguishing as I do, between the manufacturer of an article and a mere seller." (Page 546.)

The case of *Gray* vs. *Fox* (4 Barn. & Cress. 108) illustrates the distinction. That case was similar to the last, except that the defendant, instead of being the manufacturer, was one who *bought from* the manufacturer and sold again. It was held that there was no implied warranty, and for the reason here given, Chief Justice Abbott says, "The defendants were copper merchants not manufacturers." (Page 115.)

It is no objection to the view I have taken, that it will not reconcile all the cases; because they are irreconcilable. It does accord, as has been in part and might be more fully shown, with most of the leading cases in England.

Those which cannot be reconciled with it, are cases in the American Courts, which have wavered and fluctuated between the doctrines of the civil and the common law. Our view, however, leaves no difference between the two systems, except in the single case of a latent defect, of which both seller and purchaser are, for aught that appears, mutually ignorant. The parties in such a case, being equally innocent, there seems no reason in the abstract, for visiting the loss upon one rather than the other; and we can trace the reason for the opposite rules adopted, in what has been already said; the civil law, regarding a warranty as incorporated into the

contract of sale itself, as a necessary consequence held the vendor liable; while the common law with, as I conceive, more consistency and better logic, held, that where no warranty was expressed, and no reason existed, in justice, why the law should raise one by implication, there was none.

The maxim of *caveat emptor*, followed as a logical consequence from, or was the simple embodiment of this doctrine of the common law, and was not the result of any profound consideration of the effects to be produced upon society, or upon a commercial community, by the principle, as has been sometimes supposed. This maxim itself affords a strong argument that the common law has, from its origin, taken the view of the doctrine of implied warranty, which has been here presented.

The reasoning we have pursued has this merit, at least, that it gives a definite and clear rule, applicable to all cases, and one which, if adopted, would tend to produce uniformity in the decisions on this subject. It is decisive of the case before us.

The defendant's intestate having been the payee of the note, and a party to the transactions out of which it grew, must be presumed to be cognizant of the facts which made the note usurious; and upon the principles we have assumed, therefore, the law would imply an undertaking on his part to guaranty against that defect.

The only remaining enquiry is, whether there was any error in the allowance of the costs of the suit brought upon the notes.

If the positions already taken are correct, there can be no doubt of the plaintiff's right to recover the costs taxed and *recovered against him* in that suit.

The only question is, whether the referee was warranted in allowing also the taxable costs of the prosecution.

I see no reason why the rule of damages adopted in actions upon the covenant of warranty in a deed of lands, is not applicable to cases like the present.

It was held, in *Rickert* vs. *Snyder*, 9 Wend. 416, that, in an action for breach of the covenant of warranty, the plaintiff, who had been evicted, might be allowed not only his own taxable costs, in addition to the costs recovered against him, but counsel fees also.

In this case only the taxable costs were allowed; and, in that respect, it does not go as far as the rule laid down in *Rickert* vs. *Snyder* would warrant.

My conclusion therefore is, that there is no error in the report of the referee, and that the motion to set it aside must be denied.

District Court, City and County of Philadelphia, March, 1852.

JOHN R. BREITENBACH *vs.* CHARLES B. DUNGAN, *et al* EXECUTORS OF ELIHU D. TARR, GARNISHEE OF WILLIAM BOYER.

1. Where an estate to A, and his heirs, &c., is given in the premises of a deed, but the word "*heirs*" is omitted in the *habendum*, the latter may be disregarded, and A. will take an estate in fee.
2. It is no objection to an assignment for the benefit of creditors, stipulating a release, that the wife of a grantor does not join therein.

This was a motion for a rule for a new trial.

The facts of the case, and the grounds of the motion sufficiently appear in the opinion of the Court, which was delivered by

STROUD, J.—The plaintiff having obtained a judgment against Boyer, issued an attachment execution upon it, in which the late Elihu D. Tarr, Esq., was made a garnishee.

Boyer had made an assignment in trust for his creditors to Mr. Tarr. This assignment contained a stipulation for a release. According to *Thomas* vs. *Jenks*, 5 Rawle 221, and other decisions since, such a stipulation renders the assignment fraudulent and void as to non-assenting creditors, unless the *whole* of the assignor's estate is conveyed by it.

The plaintiff, upon grounds to be mentioned presently, contended that the assignment of Boyer did not convey the whole of his estate. It was in evidence that Boyer owned both real and personal property. In the premises of the assignment the word *heirs* is used in connection with the name of the assignee, but is omitted in the *habendum*. This omission, it is argued, abridged the fee which was conveyed by the premises.